

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BYBEE FARMS LLC, et al.,
Plaintiffs,

v.

SNAKE RIVER SUGAR COMPANY, et
al.,
Defendants.

No. CV-06-5007-FVS

ORDER GRANTING AND
DENYING MOTIONS

THIS MATTER came before the Court based upon the parties' cross motions for summary judgment.

BACKGROUND

The Snake River Sugar Company ("SRSC" or "the Cooperative") is organized under the law of the State of Oregon. Each year, the SRSC purchases sugarbeets from its member growers and sells them to The Amalgamated Sugar Company ("TASCO"), a sister company. The latter processes the beets and sells the refined sugar. A sugarbeet grower becomes a member of the SRSC by signing a Subscription Agreement, which is a contract to purchase one share of common stock and multiple shares of patron preferred stock. Under Article IV of the Second Amended and Restated Articles of Incorporation (hereinafter "Articles"), ownership of patron preferred stock confers both a right and a responsibility to produce sugarbeets:

Section 3. Patron Preferred Stock.

1

2 Paragraph 2. *Rights.*

3

4 (b) Delivery Rights or Quota. The holders of Patron
5 Preferred Stock shall be entitled and obligated to deliver
6 the sugarbeets from one (1) acre of land per share of Patron
7 Preferred Stock held in accordance with the rules and
8 regulations established by the Board of Directors governing
9 delivery rights and quota as exists from time to time.

10 (Article IV, § 3, ¶ 2(b), p. 3.) An SRSC member also executes a
11 Grower Agreement. Like the Articles, it confers both a right and a
12 responsibility to grow and deliver sugarbeets:

13 1. Delivery of Sugarbeets. The Grower owns and has the
14 growing rights to shares of Patron Preferred Stock of the
15 Cooperative (here-in [sic] called "Quota") as reflected on
16 the records of the Cooperative. Grower recognizes such
17 Quota as the right and obligation to grow, or cause to be
18 grown, one (1) acre of sugarbeets per share for delivery to
19 the Cooperative each crop year.

20 (Grower Agreement at 1.) The Grower Agreement establishes penalties
21 in the event a SRSC member does not fulfill his contractual
22 obligations. Should he fail to deliver his quota of sugarbeets, he
23 must compensate the SRSC:

24 7. Failure to Plant, Replant or Deliver Sugarbeets. In
25 the event Grower does not meet any of the obligations
26 specified in paragraph 5, and such failure is not excused as
provided by Paragraph 6, Grower agrees to pay to the
Cooperative a cash sum based upon the LLC's most current
projection of the resulting decrease in the LLC's
distributable cash as defined in the LLC's Company
Agreement, computed on a per acre basis ("Distributable Cash
Per Acre Decrease"). **In the event Grower has failed to
plant or deliver all or any portion of the Grower's full
Quota, the Grower will pay to the Cooperative 100% of the
Distributable Cash Per Acre Decrease for each acre which was**

1 **not planted or delivered.** . . . Grower recognizes that the
2 Cooperative and its members will suffer damages from lost
3 production, that such amount is difficult to ascertain with
4 certainty, and that the above formula is a fair and
5 reasonable method to determine damages.

6 *Id.* at 2 (emphasis added). The parties typically refer to the above-
7 described penalty as a "make-whole payment." Should a delinquent
8 grower fail to submit his make-whole payment, he forfeits his shares
9 of patron preferred stock:

10 8. Agreement to Pay Distributable Cash Per Acre
11 Decrease or the Reversion of Shares. . . . **In the event**
12 **Grower does not pay the Distributable Cash Per Acre Decrease**
13 **. . . , Grower agrees that Grower's Patron Preferred Stock**
14 **in an amount equivalent to the number of acres to which said**
15 **payment failure applies shall immediately revert and**
16 **transfer to the Cooperative without any further action of**
17 **Grower.** The Cooperative agrees to accept the reverted
18 shares as consideration for the discharge of the unpaid
19 Distributable Cash Per Acre Decrease and Grower agrees that
20 such consideration is fair and reasonable.

21 *Id.* (emphasis added).

22 In the United States, the production of sugar is regulated by the
23 federal government. By 2004, the SRSC was producing more sugarbeets
24 than TASCOS could process and sell profitably. Consequently, the
25 SRSC's Board of Directors decided to reduce the number of acres of
26 sugarbeets that each grower could plant. During 2004, the Board
27 imposed a 5% reduction. During 2005, the Board imposed a 16%
28 reduction. Individual growers were not asked to approve the
29 reductions. As a practical matter, the reductions meant that the SRSC
30 did not allow growers to "deliver the sugarbeets from one (1) acre of
31 land per share of Patron Preferred Stock" during either 2004 or 2005.

1 Instead, during 2004, the Cooperative allowed them to deliver the
2 sugarbeets from approximately .95 acre of land per share of Patron
3 Preferred Stock. During 2005, the Cooperative allowed them to deliver
4 the sugarbeets from approximately .84 acre of land per share.

5 The members of the SRSC are located in the States of Idaho,
6 Washington, and Oregon. The SRSC is divided into districts. One
7 district is composed of Washington growers, including Bybee Farms LLC,
8 Duane Munn & Sons Farms LLC, Neal Bybee, Brent Schulthies Farms LLC,
9 Brent Hartley Farms LLC, and R. Munn Farms LLC. The growers listed
10 above have formed a partnership named Sunheaven Farms. David R.
11 Walker is its manager. Besides managing the partnership, he also sits
12 on the SRSC's board of directors.

13 Sugarbeets grown by SRSC members must be transported to TASCO
14 processing plants. The freight rates for transporting sugarbeets
15 grown in the Washington district are among the highest in the
16 cooperative. The SRSC was willing to accept this circumstance as long
17 as TASCO could profitably process the growers' sugarbeets and sell the
18 refined sugar. By 2004, that was no longer the case. Not only was
19 TASCO prohibited by federal regulation from selling all of the sugar
20 that it refined (which created an enormous surplus), but the price of
21 sugar dropped precipitously.

22 Ralph Burton was the president of the SRSC and the president and
23 CEO of TASCO at all times relevant to this action. During the Fall of
24 2004, he asked to speak to the partners of Sunheaven Farms. Mr.
25 Walker arranged a meeting, which occurred in the State of Washington
26 on January 5, 2005. Mr. Burton allegedly said that TASCO was refining

1 more sugar than it could sell profitably. According to Clyde Bybee,
2 one of the persons who was present at the meeting, Mr. Burton said
3 that the SRSC intended to "collapse" the Washington district within
4 three years in order to save money. Mr. Bybee recalls Mr. Burton
5 saying that the SRSC might make the Sunheaven Farms partners pay for
6 services that the cooperative was now providing at no cost. Mr. Bybee
7 thought he understood what Mr. Burton meant. In the next few years,
8 the SRSC was going to make it prohibitively expensive for them to grow
9 sugarbeets. There was an alternative, said Mr. Burton. He allegedly
10 asked the partners to cease growing sugarbeets and sell their shares
11 of stock to the SRSC, going on to indicate that their shares of patron
12 preferred stock were worth \$800.00 per share.

13 The Sunheaven Farms partners knew that Mr. Burton had significant
14 influence with the directors. He was, in the words of Mr. Walker,
15 "someone that could get things done." The partners assumed that his
16 request had the tacit, if not the express, approval of the executive
17 committee of the SRSC's board of directors. Thus, on January 17th,
18 they submitted a memorandum to the executive committee. Two partners
19 said they intended to grow sugarbeets during 2005, but would be
20 willing to sell their shares after three years if the Washington
21 district was going to be "collapsed." Three other partners said they
22 were presently willing to sell their shares for \$1000.00 per share,
23 but would grow sugarbeets during 2005 if the executive committee
24 rejected their offers.

25 On January 24th, Mr. Burton sent a three-paragraph email to Mr.
26 Walker in which he alluded to the growers' respective offers. The

1 last paragraph of Mr. Burton's email states, "I don't have anything
2 definitive and may not for a while. This of course argues that this
3 may be a next year deal." Mr. Walker printed the email and jotted a
4 note on it before providing copies to the partners of Sunheaven Farms.
5 "Thought you might be interested in Ralph's comments," he advised the
6 partners. "Getting \$1,000 per share will not be slam dunk."

7 On February 17th, the executive committee held a meeting by means
8 of a telephone conference call. Participants discussed the offers
9 made by the Sunheaven Farms partners and decided they were
10 unacceptable. Although Mr. Burton participated in the call, and
11 although he was aware of the executive committee's decision, he did
12 not inform the Sunheaven Farms partners that their offers had been
13 rejected.

14 Duane Munn & Sons Farms was one of the growers who submitted an
15 offer to sell. Brandon Munn is one of Duane's sons. Brandon is
16 actively involved in the operation of Duane Munn & Sons Farms. While
17 he knew that his father had made a decision not to plant sugarbeets in
18 2005, and while he believed that "a deal was in progress," the absence
19 of a response from the executive committee made him anxious. His
20 anxiety was justified. As explained above, paragraphs 7 and 8 of the
21 Grower Agreement establish penalties in the event a member fails to
22 fulfill his contractual obligations. Brandon may not have know the
23 precise terms of Paragraphs 7 and 8, but he knew that his father's
24 decision not to plant sugarbeets could result in severe penalties.
25 Consequently, he repeatedly questioned Vic Jaro, SRSC's Vice President
26 of Agriculture, about the contractual ramifications of his father's

1 decision not to plant sugar beets during 2005:

2 In the end, . . . I asked him, if we don't grow these
3 sugarbeets, which we're not planning on doing, will it look
4 negatively on us if this buyout doesn't happen until later,
5 and he says nope, it won't look negatively, we know the
buyout's in progress, just because it's not finalized today
doesn't mean you'll be penalized later.

6 Mr. Jaro's comments allayed Brandon's concerns. Nevertheless, by the
7 Summer of 2005, it had become apparent to all concerned that a buyout
8 was not in progress. During the Fall, Duane Munn & Sons Farms LLC and
9 Bybee Farms LLC retained counsel, who began negotiating with the SRSC.
10 Fearing that the SRSC intended to invoke the penalty provisions
11 contained in the Grower Agreement, those two growers and a third
12 company filed the instant action on January 26, 2006. Negotiations
13 continued thereafter, but the parties were unable to resolve their
14 differences. Relying upon paragraph 7 of the Grower Agreement, the
15 Board demanded payment of \$75.00 for each acre of land that the
16 plaintiffs failed to plant. When they did not submit the make-whole
17 payments demanded by the Board, it forfeited their shares of Patron
18 Preferred Stock pursuant to paragraph 8. On June 4, 2007, the
19 plaintiffs filed a second amended complaint. The defendants have
20 filed an answer that denies liability and asserts counterclaims. The
21 parties have filed cross-motions for summary judgment.

22 **OFFER/COUNTEROFFER**

23 The plaintiffs allege that Mr. Burton made essentially the
24 following offer on January 5, 2005. "If you will cease growing
25 sugarbeets, the SRSC will purchase your shares of patron preferred
26 stock at a reasonable price." That is to say, Mr. Burton allegedly

1 offered the plaintiffs a promise (the SRSC will purchase your shares
2 of stock) in exchange for a forbearance on the plaintiffs' part (if
3 you will cease growing sugarbeets). By allegedly making this offer,
4 Mr. Burton laid the foundation for unilateral contracts between the
5 SRSC and the plaintiffs. *Browning v. Johnson*, 70 Wn.2d 145, 148, 422
6 P.2d 314 (1967) ("A unilateral contract is one in which a promise is
7 given in exchange for an act or forbearance."). See also 25 David K.
8 DeWolf et al., *Washington Practice, Contract Law and Practice* § 1:4,
9 at 7-9 (2007).

10 Mr. Burton may have laid the foundation for unilateral contracts,
11 but enforceable contracts did not arise on January 5th. Indeed,
12 contracts could not arise until the plaintiffs refrained from planting
13 sugarbeets. Only by providing the forbearance requested by Mr. Burton
14 could the plaintiffs accept his alleged offer to purchase their shares
15 of patron preferred stock. See *Multicare Med. Center v. State, Dep't*
16 *of Soc. & Servs.*, 114 Wn.2d 572, 584, 790 P.2d 124 (1990) ("under a
17 unilateral contract, an offer cannot be accepted by promising to
18 perform; rather, the offeree must accept, if at all, by performance,
19 and the contract then becomes executed" (citing *Cook v. Johnson*, 37
20 Wn.2d 19, 23, 221 P.2d 525 (1950))). Furthermore, the putative
21 parties to the contracts had not agreed upon the value of the
22 plaintiffs' respective shares. Cf. *Kloss v. Honeywell*, 77 Wn. App.
23 294, 298, 890 P.2d 480 (1995) (as a general rule, "price" is one of
24 the essential elements of a contract). Mr. Burton allegedly told the
25 plaintiffs that he thought their patron preferred stock was worth
26 \$800.00 per share. They thought their stock was worth more than that.

1 In order to obtain a better price, they demanded \$1000.00 per share
2 and threatened to plant sugarbeets unless the SRSC assented.

3 The plaintiffs never intended to carry out the threat. To the
4 contrary, it was a "bargaining chip." They had decided to accept Mr.
5 Burton's alleged offer and to sell their shares of patron preferred
6 stock to the SRSC. Nevertheless, by conditioning a sale upon the
7 SRSC's assent to the price that they named, they effectively rejected
8 Mr. Burton's alleged offer. See *Rorvig v. Douglas*, 123 Wn.2d 854,
9 858, 873 P.2d 492 (1994) ("an acceptance that requests modification of
10 terms may consummate a contract unless the additional terms are
11 conditions of acceptance" (citing *Restatement (Second) of Contracts* §
12 61 (1981))). At most, the plaintiffs made counteroffers. See *Blue*
13 *Mountain Constr. Co. v. Grant County Sch. Dist. No. 150-204*, 49 Wn.2d
14 685, 688, 306 P.2d 209 (1957) ("An expression of assent that changes
15 the terms of the offer in any material respect may be operative as a
16 counteroffer; but it is not an acceptance and consummates no
17 contract.").

18 The executive committee did not respond to the plaintiffs'
19 memorandum of January 17th. Assuming, for purposes of argument, that
20 the plaintiffs' memorandum set forth counteroffers, the executive
21 committee's silence did not amount to acceptance unless the executive
22 committee had a duty to inform the plaintiffs of its decision. See
23 *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846,
24 853, 22 P.3d 804 (2001). "Acceptance by silence is exceptional."
25 *Restatement (Second) of Contracts* § 69, cmt. a (1981). Typically, a
26 duty to speak arises in two classes of cases: "those where the

1 offeree silently takes offered benefits, and those where one party
 2 relies on the other party's manifestation of intention that silence
 3 may operate as acceptance." *Id.*, cmt. b. This case does not fall
 4 into either class. The SRSC did not accept services from the
 5 plaintiffs. *Cf. Hoglund v. Meeks*, 139 Wn. App. 854, 872, 170 P.3d 37
 6 (2007) (an attorney's silence constituted acceptance of a fee-
 7 splitting agreement where she continued to accept the other attorney's
 8 legal services and "repeatedly promised to work out the specific terms
 9 of a written memorialization of their agreement"). Nor did the
 10 plaintiffs ever say to the SRSC that they would construe its silence
 11 as acceptance. As a result, the executive committee's failure to
 12 inform the plaintiffs of its decision did not constitute acceptance of
 13 their respective counteroffers.

14 **PROMISSORY ESTOPPEL (First Cause of Action)**

15 The plaintiffs seek to enforce Mr. Burton's and Mr. Jaro's
 16 alleged promises under the doctrine of promissory estoppel. "The
 17 purpose of promissory estoppel is '"to make a promise binding, under
 18 certain circumstances, without consideration in the usual sense of
 19 something bargained for and given in exchange.'" *Greaves v. Medical*
 20 *Imaging Sys., Inc.*, 124 Wn.2d 389, 398, 879 P.2d 276 (1994) (quoting
 21 *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 261 n.4,
 22 616 P.2d 644 (1980) (quoting *Raedeke v. Gibraltar Savings & Loan*
 23 *Ass'n*, 10 Cal.3d 665, 672-73, 111 Cal.Rptr. 693, 517 P.2d 1157 (1974)
 24 (quoting *Youngman v. Nevada Irrigation Dist.*, 70 Cal.2d 240, 249, 74
 25 Cal.Rptr. 398, 449 P.2d 462 (1969))). In order to prevail, the
 26 plaintiffs must prove the existence of "(1) [a] promise which (2) the

1 promisor should reasonably expect to cause the promisee to change his
2 position and (3) which does cause the promisee to change his position
3 (4) justifiably relying upon the promise, in such a manner that (5)
4 injustice can be avoided only by enforcement of the promise." *Corbit*
5 *v. J.I. Case Co.*, 70 Wn.2d 522, 539, 424 P.2d 290 (1967) (citing
6 Restatement of Contracts § 90 (1932)).

7 A. Mr. Burton's Alleged Promise

8 The plaintiffs allege that Mr. Burton promised them that the SRSC
9 would purchase their shares of patron preferred stock at a reasonable
10 price if they ceased growing sugarbeets. The plaintiffs further
11 allege that they ceased growing sugarbeets -- i.e., they changed
12 position -- in reliance upon his alleged promise. The plaintiffs'
13 change of position was a type of forbearance. Black's Law Dictionary
14 (8th ed.2004) (defining forbearance as "refraining from enforcing a
15 right"). Moreover, their forbearance arguably was bargained for. Mr.
16 Burton sought it in exchange for his alleged promise, and the
17 plaintiffs gave it in exchange for his promise. *Restatement, supra*, §
18 71(2) (a forbearance "is bargained for if it is sought by the promisor
19 [here, Mr. Burton] in exchange for his promise and is given by the
20 promisee [here, the plaintiffs] in exchange for that promise").¹ Not
21 only does it appear that the plaintiffs' forbearance was bargained
22 for, but also it appears that they suffered a detriment as a result.
23 They gave up both the contractual right to grow sugarbeets and the
24 satisfaction and income they had derived from doing so. See *Browning*,

25
26 ¹The Washington Supreme Court adopted § 71 in *Labriola v.*
Pollard Group, Inc., 152 Wn.2d 828, 833-34, 100 P.2d 791 (2004).

1 70 Wn.2d at 148 (detriment means "giving up of 'something which
2 immediately prior thereto the promisee was privileged to retain'"
3 (quoting 1 *Williston on Contracts* § 102A, at 382 (3rd ed.1957))). And
4 by ceasing sugarbeet production, the plaintiffs arguably conferred a
5 benefit upon the SRSC. Without question, they gave the SRSC something
6 that Mr. Burton actively sought; something he thought would benefit
7 the SRSC as a whole. He may have been proved incorrect by subsequent
8 events, but during January of 2005, he was convinced that reduced
9 sugarbeet production was essential to the financial health of the
10 SRSC.

11 It may be that the plaintiffs provided the SRSC with a bargained-
12 for forbearance. In other words, the plaintiffs' forbearance may have
13 constituted consideration for Mr. Burton's alleged promise. See
14 *Vehicle/Vessel, LLC v. Whitman County*, 122 Wn. App. 770, 777, 95 P.3d
15 394 (2004) ("[c]onsideration for a unilateral contract consists of the
16 offeree's performance of the required terms" (citing *Multicare Med.*
17 *Center*, 114 Wn.2d at 584)). The existence of a bargained-for
18 forbearance -- if, indeed, the forbearance was bargained for -- could
19 be fatal to the plaintiffs' promissory estoppel claim. "If the
20 promisee's performance [here, the plaintiffs' forbearance] was
21 requested at the time the promisor made his promise [here, Mr.
22 Burton's alleged promise regarding the SRSC's purchase of their stock]
23 and that performance was bargained for, the doctrine [of promissory
24 estoppel] is inapplicable." *Greaves*, 124 Wn.2d at 398 (internal
25 quotation marks and citations omitted). See also 3 Eric Mills Holmes,
26 *Corbin on Contracts* § 8.12, at 79-80 (rev. ed.1996) ("the doctrine [of

1 promissory estoppel] is inapplicable as a matter of law when all the
2 promises made are bargained for and supported by consideration"). At
3 oral argument, the plaintiffs insisted that they may bring a claim for
4 promissory estoppel even if their act of refraining from planting
5 sugarbeets was given in exchange for Mr. Burton's promise. According
6 to the plaintiffs, a promisee may bring a claim for promissory
7 estoppel if he cannot establish the elements of a unilateral contract,
8 i.e., the promisee has no remedy under "'the law of consideration.'" *Youngman v. Nevada Irrigation Dist.*, 70 Cal.2d 240, 249, 74 Cal.Rptr.
9 398, 404, 449 P.2d 462 (1969) (quoting *Healy v. Brewster*, 59 Cal.2d
10 455, 463, 30 Cal.Rptr. 129, 133, 380 P.2d 817 (1963)).² See also 3 E.
11 Holmes, *supra* § 8.12, at 80 ("[w]hen a promisee's conduct in reliance
12 is bargained for, the law of consideration is triggered"). The
13 plaintiffs cited no authority for this proposition and, to date,
14 independent research has failed to uncover any. To the contrary, it
15 appears that the plaintiffs remedy for the SRSC's failure to honor Mr.
16 Burton's alleged promise was to bring a claim for breach of a
17 unilateral contract. The plaintiffs decided not to seek relief under
18 the law of consideration. Having made that choice, it does not appear
19 that they may bring a cause of action for promissory estoppel based
20 upon Mr. Burton's alleged promise. Nevertheless, the Court reserves
21 ruling upon this issue because the parties have not had an opportunity
22 to submit memoranda.
23
24

25 ²This line of California cases was cited with approval in
26 *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 261
n.4, 616 P.2d 644 (1980).

1 B. Mr. Burton's Authority

2 Mr. Burton was the SRSC's agent at all times relevant to this
3 action. In Washington, "[a]n agent can bind [his] principal to a
4 contract when the agent has either actual or apparent authority." See
5 *Hoglund*, 139 Wn. App. at 866. Mr. Burton did not have actual
6 authority to offer to purchase the plaintiffs' shares of stock if they
7 ceased growing sugarbeets. Thus, the plaintiffs must prove that he
8 had apparent authority to do so. "Whether an agent has apparent
9 authority to make a contract depends upon the circumstances and is to
10 be decided by the trier of fact." *State of Washington v. French*, 88
11 Wn. App. 586, 595, 945 P.2d 752 (1997) (internal punctuation and
12 citations omitted)). Summary judgment is warranted where "the
13 evidence presented by both sides would permit the trier of fact to
14 come to only one conclusion." *Japan Telecom, Inc. v. Japan Telecom*
15 *Am., Inc.*, 287 F.3d 866, 871 (9th Cir.2002).

16 "An agent's apparent authority to bind a principal depends upon
17 the objective manifestations of the principal to a third person." *Id.*
18 A principal may communicate objective manifestations of authority to a
19 third person by word or by deed. See *Hoglund*, 139 Wn. App. at 869-70.
20 By itself, however, a principal's communication of objective
21 manifestations of authority is not enough to cloak an agent with the
22 principal's authority. More is required. Not only must the
23 principal's objective manifestations "cause the one claiming apparent
24 authority to actually, or subjectively, believe that the agent has
25 authority to act for the principal," *Udall v. T.D. Escrow Services,*
26 *Inc.*, 159 Wn.2d 903, 913, 154 P.3d 882 (2007), but also "the

1 claimant's actual, subjective belief [must be] objectively
2 reasonable." *Id.* (internal punctuation and citation omitted).

3 One of the ways in which a principal may cloak an agent with
4 apparent authority is "'by appointing [him] to a position, such as
5 that of manager or treasurer, which carries with it generally
6 recognized duties; to those who know of the appointment there is
7 apparent authority to do the things ordinarily entrusted to one
8 occupying such a position[.]'" *Smith v. Hansen, Hansen & Johnson,*
9 *Inc.*, 63 Wn. App. 355, 365, 818 P.2d 1127 (1991) (quoting *Restatement*
10 *(Second) of Agency* § 27 cmt. a (1958)), *review denied*, 118 Wn.2d 1023
11 (1992). The SRSC employed Mr. Burton as its president. The
12 plaintiffs knew that. They also knew that he had asked to speak to
13 them in his official capacity and that he was someone who "could get
14 things done" (i.e., he wielded considerable influence within the
15 SRSC). In view of these circumstances, a rational jury would have no
16 trouble finding that they subjectively believed Mr. Burton was
17 speaking with the approval of the SRSC when he asked them to cease
18 growing sugarbeets and sell their shares.

19 The more difficult issue is whether a rational jury could also
20 find that the plaintiffs' subjective perception of Mr. Burton's
21 authority was objectively reasonable. The plaintiffs were receiving
22 advice from David Walker, who was the manager of Sunheaven Farms and a
23 member of the SRSC's board of directors. During his deposition, Mr.
24 Walker acknowledged that he could think of no SRSC officer or employee
25 who was authorized to purchase a grower's shares without board
26 approval. To the contrary, he assumed that board approval would be

1 required. Despite his awareness of this limitation on Mr. Burton's
2 authority as president, neither Mr. Walker nor any of the plaintiffs
3 attempted to ascertain whether Mr. Burton was speaking for the board
4 when he allegedly offered to purchase their shares of stock. The
5 absence of any inquiry is significant. "If a person has been put on
6 notice of limitations of an agent's authority, the person has a duty
7 to inquire into the limitations, and if he fails to do this, he will
8 be deemed to have actual knowledge of the agent's lack of authority."
9 *Stroud v. Beck*, 49 Wn. App. 279, 285, 742 P.2d 735 (1987). As the
10 record now stands, a rational jury could conclude that the plaintiffs
11 had a duty to inquire based upon the information that was available to
12 them. However, a jury would not be compelled to reach that
13 conclusion. It is possible the plaintiffs will be able to persuade
14 the jury that reasonable growers in their position would have thought
15 that inquiry was unnecessary. Consequently, a jury issue exists with
16 respect to whether the plaintiffs' subjective beliefs about Mr.
17 Burton's authority were objectively reasonable.

18 C. Mr. Jaro's Alleged Promise

19 Mr. Jaro is the SRSC's Vice President of Agriculture. Brandon
20 Munn recalls speaking with Mr. Jaro more than once during the Winter
21 and Spring of 2005, although Brandon is unsure when the conversations
22 occurred. During one of the conversations, Mr. Jaro allegedly told
23 Brandon that his family's failure to plant sugarbeets "won't look
24 negatively[.] [W]e know the buyout's in progress[;] just because it's
25 not finalized today doesn't mean you'll be penalized later." Since
26 Mr. Jaro did not ask anything of Brandon in exchange for his alleged

1 promise, nor did Brandon offer anything to Mr. Jaro beyond the
2 forbearance already provided, Mr. Jaro's alleged promise can sustain a
3 promissory estoppel claim.

4 A rational jury arguably could find that Mr. Jaro made the
5 disputed statements between January 17th (the date of the Munns'
6 counteroffer) and February 17th (the date of the executive committee's
7 decision). During that period of time, the Munns received a
8 pessimistic email from Mr. Burton via Mr. Walker. Other than that,
9 the Munns heard nothing from the SRSC about their offer, with the
10 possible exception of Mr. Jaro's alleged statements to Brandon. Mr.
11 Jaro's alleged statements were significant for at least two reasons.
12 First, his statements encouraged Brandon to think that a purchase-sale
13 agreement was in process despite evidence to the contrary. Second,
14 his statements indicated that the SRSC would not demand make-whole
15 payments until later, presumably when the deal closed. This was an
16 attractive promise. Brandon reasonably could have believed that if
17 his family received at least \$800.00 per share at closing, which was
18 the figure Mr. Burton allegedly mentioned during the January 5th
19 meeting, then his family would have the money necessary to make the
20 make-whole payments required by the Grower Agreement. The problem
21 with Mr. Jaro's alleged statements to Brandon is that no purchase-sale
22 agreement was in process. At best, an agreement was something that
23 Mr. Burton hoped to arrange between the Washington growers and the
24 SRSC. Had Mr. Jaro disclosed this information to Brandon, rather than
25 allegedly misleading him, it is virtually certain that Brandon would
26 have relayed Mr. Jaro's comments to his father, and it is likely that

1 his father would have revised his assessment of Mr. Burton's comments
2 at the January 5th meeting.

3 In the alternative, a rational jury arguably could find that Mr.
4 Jaro made his alleged statements to Brandon after the executive
5 committee meeting. The defendants do not deny that Mr. Jaro learned
6 of the executive committee's decision on or shortly after February
7 17th. If, knowing the executive committee's decision, Mr. Jaro told
8 Brandon, "we know the buyout's in progress," then Mr. Jaro wilfully
9 deceived Brandon. The alleged deceit was material to the Munns'
10 decision-making process because there was still time to plant.
11 Undoubtedly, the Munns would have done so had Mr. Jaro disclosed the
12 true state of affairs that existed after February 17th.

13 It remains to be seen whether a jury will credit Brandon's
14 account of his conversations with Mr. Jaro. But a jury could credit
15 his account; and if it does, the SRSC may be estopped from reneging on
16 Mr. Jaro's alleged promise to the effect that the Cooperative would
17 not demand make-whole payments from the Munns with respect to the 2005
18 crop until a purchase-sale agreement closed.

19 **UNJUST ENRICHMENT (Second Cause of Action)**

20 The plaintiffs allege that the SRSC has obtained substantial
21 financial benefits because they refrained from growing sugarbeets at
22 Mr. Burton's request. For one thing, the SRSC's surplus of sugarbeets
23 has been reduced. For another, the SRSC has avoided paying freight
24 costs. Finally, the SRSC has obtained, or will obtain, their shares
25 of patron preferred stock without paying for them. While the
26 plaintiffs allege that the SRSC obtained these benefits because they

1 refrained from growing sugarbeets, the plaintiffs do not allege that
2 the Court could find from the facts of this case that the SRSC
3 implicitly contracted to pay for these benefits. *See Chandler v.*
4 *Washington Toll Bridge Auth.*, 17 Wn.2d 591, 600, 137 P.2d 97 (1943)
5 (“[c]ontracts implied in fact arise from . . . circumstances showing a
6 mutual consent and intention to contract”). Rather, the plaintiffs
7 urge the Court to impose upon the SRSC a legal duty to pay for them.
8 Put somewhat differently, the plaintiffs urge the Court to imply the
9 existence of a contract as a matter of law. *See id.* at 600-01 (“[a]
10 contract implied in law is an obligation imposed upon a person by the
11 law, not in pursuance of his intention and agreement, either express
12 or implied, but found against his will and design, because the
13 circumstances between the parties are such as to render it just that
14 one should have a right and the other a corresponding liability
15 similar to that which would arise from a contract between them”
16 (quoting *Byram v. Thurston County*, 141 Wash. 28, 39, 251 P. 103, 252
17 P. 943 (1926))). According to the plaintiffs, failure to find the
18 existence of a quasi contract will result in the unjust enrichment of
19 the SRSC. *See Lynch v. Deaconess Medical Center*, 113 Wn.2d 162, 165,
20 776 P.2d 681 (1989) (“[q]uasi contracts are founded on the equitable
21 principle of unjust enrichment which simply states that one should not
22 be ‘unjustly enriched at the expense of another’” (quoting *Milone &*
23 *Tucci, Inc. v. Bona Fide Builders, Inc.*, 49 Wn.2d 363, 367, 301 P.2d
24 759 (1956))).

25 The plaintiffs’ unjust enrichment claim faces a formidable
26 obstacle. Each of the benefits described above -- *i.e.*, reduced

1 production of sugarbeets, reduced freight costs, and forfeiture of
2 stock -- is addressed by an express contract: either a Grower
3 Agreement, an Annual Planting Contract, or both.³ These express
4 contracts govern the parties' rights and responsibilities with respect
5 to sugarbeet production, allocation of freight costs, and stock
6 forfeiture. When a party is bound by the provisions of a valid,
7 express contract, he "may not disregard the same and bring an action
8 on an implied contract relating to the same matter, in contravention
9 of the express contract." *Chandler*, 17 Wn.2d at 604. Thus, the
10 plaintiffs may not bring an unjust enrichment claim based upon the
11 windfall that the SRSC allegedly has reaped.

12 **BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING (Third Cause of**
13 **Action)**

14 Each plaintiff's entry into the SRSC was memorialized by means of
15 a contract that is entitled "Subscription Agreement." Paragraph 13(b)
16 of each Subscription Agreement states, "The Undersigned may sell its
17 shares of Patron Preferred Stock to one or more existing members of
18 the Cooperative . . ., in each case subject to approval by the Board
19 of Directors." (Subscription Agreement, ¶ 13(b), at 6.) After
20 purchasing stock in the Cooperative, each plaintiff entered into a
21 Grower Agreement. Paragraph 1 states in part:

22 The Grower owns and has the growing rights to shares of

23
24 ³Paragraph 1(a) of the Grower Agreement states in part, "The
25 Grower agrees to enter into an Annual Planting Contract with the
26 Cooperative setting forth the acres to be grown and the
description of the land on which said sugarbeets will be
grown[.]"

1 Patron Preferred Stock of the Cooperative (here-in [sic]
2 called "Quota") as reflected on the records of the
3 Cooperative. Grower recognizes such Quota as the right and
4 obligation to grow, or cause to be grown, one (1) acre of
sugarbeets per share for delivery to the Cooperative each
crop year.

5 (Grower Agreement, ¶ 1, at 1.)

6 In the States of Idaho and Washington, every contract contains an
7 implied contract of good faith and fair dealing. See, e.g., *Idaho*
8 *First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 288, 824
9 P.2d 841, 849 (1991); *Badgett v. Security State Bank*, 116 Wn.2d 563,
10 807 P.2d 356 (1991). The Supreme Court of the State of Idaho has
11 observed that Idaho's "analysis and definition of the implied covenant
12 of good faith and fair dealing is consistent with surrounding states."
13 *Idaho First Nat'l Bank*, 121 Idaho at 288. Indeed, in *Idaho First*
14 *Nat'l Bank*, the Idaho Supreme Court quoted the following passage from
15 *Badgett* with approval:

16 There is in every contract an implied duty of good faith and
17 fair dealing. This duty obligates the parties to cooperate
18 with each other so that each may obtain the full benefit of
19 performance. . . . However, the duty of good faith does
20 not extend to obligate a party to accept a material change
21 in the terms of its contract. . . . Nor does it "inject
22 substantive terms into the parties' contract." Rather, it
23 requires only that the parties perform in good faith the
obligations imposed by their agreement. . . . Thus, the
duty arises only in connection with terms agreed to by the
parties.

24 121 Idaho at 288 (quoting *Badgett*, 116 Wn.2d at 569) (citations
25 omitted by, and emphasis added by, the Idaho Supreme Court). Since
26 there is no conflict between the law of the States of Idaho and

1 Washington, choice of law analysis is unnecessary. Local law applies.
2 *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 692, 167 P.3d 1112
3 (2007).

4 The plaintiffs allege that the SRSC breached duties of good faith
5 and fair dealing that are implied in the Grower and Subscription
6 Agreements. Insofar as the Grower Agreements are concerned, the
7 plaintiffs allege that, during 2004 and 2005, the SRSC improperly
8 prohibited them from growing one acre of sugarbeets for each acre of
9 Patron Preferred Stock that they held. The plaintiffs further allege
10 that agents of the SRSC pressured them to sell their shares of Patron
11 Preferred Stock, made a disingenuous offer to purchase their shares,
12 refused to purchase their shares, falsely assured them that they would
13 not be penalized if they refrained from growing sugarbeets during
14 2005, and improperly invoked penalty provisions in the Grower
15 Agreements. Insofar as the Subscription Agreements are concerned, the
16 plaintiffs allege that the SRSC frustrated their efforts to sell their
17 shares of Patron Preferred Stock to other members of the SRSC.

18 A. Unilateral Acreage Reduction

19 By the end of 2003, the SRSC was producing more sugarbeets than
20 TASCOCO could process and sell profitably. During both 2004 and 2005,
21 the SRSC's Board of Directors decided to limit the Cooperative's
22 production of sugarbeets by restricting the number of acres that its
23 members could plant. Even assuming, for purposes of argument, that
24 the SRSC violated the Grower Agreements' one-acre-per-share provision,
25 a rational jury would be unable to find that the Cooperative acted in
26 bad faith. First, there is no evidence that the SRSC fabricated the

1 existence of a sugar surplus or its potentially damaging effect upon
2 the Cooperative. To the contrary, it is undisputed that the SRSC had
3 a surplus of refined sugar by the end of 2003 and that the surplus
4 created serious financial problems for the Cooperative. Second, there
5 is no evidence that the SRSC acted deviously in responding to the
6 problem. To the contrary, the SRSC's decision to limit production was
7 made through its normal decision-making process; a process in which
8 the plaintiffs had a small voice. Third, there is no evidence that
9 the SRSC's response was economically unreasonable. To the contrary,
10 during 2004 and the first eight months of 2005, it appeared that the
11 Cooperative had little hope of increasing sales. Consequently, its
12 only apparent option was to limit production of sugarbeets. Finally,
13 there is no evidence that the Cooperative imposed the disputed acreage
14 reductions as a result of ill will toward the plaintiffs.

15 B. Pressure to Sell Stock

16 The plaintiffs allege that, on January 5, 2005, Ralph Burton told
17 them that the SRSC intended to make it prohibitively expensive for
18 them to continue growing sugarbeets within three years by requiring
19 them to pay for services that the Cooperative was then providing at no
20 charge. The plaintiffs allege that Mr. Burton made this statement in
21 order to pressure them into selling their shares of Patron Preferred
22 Stock to the SRSC, *i.e.*, terminating their contractual relationship
23 with the Cooperative. Depending upon what Mr. Burton actually said,
24 his statement about the SRSC's future intentions could have
25 constituted an attempt to obtain release from contractual duties by
26 means of a threat. *Cf.* 2 Joseph M. Perillo & Helen Hadjiyannakis

1 Bender, *Corbin on Contracts* § 7.21, at 461-69 (rev. ed. 1995)
2 (discussing bad-faith demands for contract modifications). However,
3 that does not mean Mr. Burton's alleged threat was improper. "A
4 threat by a party to a contract not to perform his contractual duty is
5 not, of itself, improper. Indeed, a modification induced by such a
6 threat may be binding, even in the absence of consideration, if it is
7 fair and equitable in view of unanticipated circumstances."
8 *Restatement, supra*, § 176 cmt. e. The defendants argue that Mr.
9 Burton's comments at the January 5th meeting were justified in view of
10 the financial crisis which the SRSC was facing at the beginning of
11 2005. While the defendants may be correct, reasonable minds can
12 differ. The plaintiffs are entitled to present evidence indicating
13 that Mr. Burton's comments constituted an improper threat.

14 C. Failure to Respond to Counteroffer

15 The plaintiffs allege that, on January 5th, Mr. Burton promised
16 them that the SRSC would purchase their shares of Patron Preferred
17 Stock at a reasonable price if they ceased growing sugarbeets. The
18 plaintiffs concede that Mr. Burton lacked actual authority to make the
19 promise. Not knowing this, say the plaintiffs, they submitted a
20 memorandum to the executive committee setting forth the terms upon
21 which they were willing to sell. The executive committee rejected
22 their terms, but did not inform them of its decision. According to
23 the plaintiffs, the executive committee acted in bad faith by refusing
24 to purchase their shares; and then compounded its bad faith by failing
25 to inform them of its decision.

26 By itself, neither of the plaintiffs' allegations is sufficient

1 to create a jury issue. To begin with, an implied duty of good faith
2 "'arises only in connection with terms agreed to by the parties.'" *Idaho First Nat'l Bank*, 121 Idaho at 288 (quoting *Badgett*, 116 Wn.2d
3 at 569). As the defendants point out, neither the Subscription
4 Agreements nor the Grower Agreements contain provisions obligating the
5 SRSC to negotiate the purchase of the plaintiffs' shares of Patron
6 Preferred Stock. *Cf. Keystone Land & Dev. Co. v. Xerox Corp.*, 152
7 Wn.2d 171, 179, 94 P.3d 945 (2004) (no contract to negotiate a future
8 contract where the "parties did not exchange promises to conform to a
9 specific course of conduct during negotiations, such as negotiating in
10 good faith, exclusively with each other, or for a specific period of
11 time"). Absent specific provisions regarding the purchase of shares,
12 a duty to negotiate in good faith cannot be implied. *See id.* at 177
13 ("there is no 'free-floating' duty of good faith and fair dealing that
14 is unattached to an existing contract" (quoting *Badgett*, 116 Wn.2d at
15 570)). Since the SRSC was under no obligation to negotiate a purchase
16 of the plaintiffs' shares, it was under no obligation to inform them
17 of its rejection of their counteroffers. *Cf. Saluteen-Maschersky*, 105
18 Wn. App. at 853 ("Failure to reject an offer is not equivalent to
19 assent of that contract since silence is acceptance only where there
20 is a duty to speak.").

21
22 D. Invoking Penalty Provisions with Respect to Failure to Plant
23 During 2005

24 Pursuant to paragraphs 7 and 8 of each Grower Agreement, the SRSC
25 may impose penalties in the event a member fails to deliver his quota
26 of sugarbeets. The fact that the Grower Agreement confers discretion

1 upon the SRSC means that the SRSC has an implied duty to exercise its
2 authority in good faith. *Cf. Goodyear Tire & Rubber Co. v. Whiteman*
3 *Tire*, 86 Wn. App. 732, 738, 935 P.2d 628 (1997) (hereinafter
4 "*Goodyear*") ("The covenant of good faith applies when the contract
5 gives one party discretionary authority to determine a contract
6 term[.]"). During the Winter and Spring of 2005, employees of the
7 SRSC who worked with the plaintiffs observed that they were neither
8 planting nor preparing to plant sugarbeets. The employees who noticed
9 the plaintiffs' lack of activity allegedly communicated this
10 information to their superiors. Since the SRSC depends upon its
11 members' annual deliveries of sugarbeets, the plaintiffs' failure to
12 plant or prepare to plant jeopardized the SRSC's economic expectations
13 under the Grower Agreements. Nevertheless, despite the contractual
14 and financial implications of the plaintiffs' inactivity, no one asked
15 them why they weren't planting. No one informed them that their
16 counteroffers had been rejected, and no one reminded them that their
17 failure to plant violated their respective Grower Agreements.
18 Instead, the SRSC's officers and employees either remained silent or,
19 in at least one instance, allegedly made misleading statements. Given
20 the SRSC's and the plaintiffs' common interest in maintaining the
21 financial well-being of the Cooperative, a rational jury could find
22 that the SRSC violated its duty of good faith by remaining silent
23 during 2005 until it was too late for the plaintiffs to plant and then
24 penalizing them for failing to do so. *Restatement, supra*, § 205 cmt.
25 a ("[g]ood faith . . . enforcement of a contract emphasizes
26 faithfulness to an agreed common purpose and consistency with the

1 justified expectations of the other party"").⁴

2 E. Subscription Agreements

3 Paragraph 13(b) of each Subscription Agreement states, "The
4 Undersigned may sell its shares of Patron Preferred Stock to one or
5 more existing members of the Cooperative . . ., in each case subject
6 to approval by the Board of Directors." This provision confers
7 discretion upon the Board, e.g., to grant or deny a grower's request
8 to sell his shares. As a result, the Board is bound by an implied
9 covenant of good faith and fair dealing. See *Goodyear*, 86 Wn. App. at
10 738. In order to fulfill its implied obligations, the Board must
11 exercise its authority in a manner that is consistent "with the
12 justified expectations" of the SRSC's growers. *Restatement, supra*, §
13 205 cmt. a. Washington appellate courts apply the covenant of good
14 faith and fair dealing in a balanced manner. As one court explained,
15 while the covenant "casts on each party a duty not to interfere with
16 the other party's performance[,] . . . [i]t does not . . . cast on
17 either party a duty to affirmatively assist in the other party's
18 performance." *State of Washington v. Trask*, 91 Wn. App. 253, 272-73,
19 957 P.2d 781, 974 P.2d 1269 (1998). Applying those principles to the
20 facts of this case, it is clear that the Board did not have a duty to
21 locate SRSC growers who were willing to purchase the plaintiffs'
22 shares. Nevertheless, the Board's freedom of action was subject to
23 significant constraints. It could neither unreasonably interfere with

25 ⁴The Washington Court of Appeals has quoted part of this
26 definition with approval. *Frank Coluccio Constr. Co. v. King*
County, 136 Wn. App. 751, 766, 150 P.3d 1147 (2007).

1 the plaintiffs' efforts to find suitable buyers, nor could it
2 unreasonably withhold approval of a proposed sale.

3 The parties disagree with respect to whether the Board acted
4 unreasonably. The plaintiffs allege that the Board denied them access
5 to a list of SRSC growers in eastern Idaho, actively discouraged SRSC
6 growers in eastern Idaho from purchasing their shares, and imposed
7 conditions that made it impossible for them to arrange sales. The
8 defendants dispute each of the plaintiffs' contentions. Furthermore,
9 the defendants allege that they had compelling business reasons for
10 prohibiting the plaintiffs from selling shares to SRSC growers in
11 eastern Idaho. As the plaintiffs note, sugarbeets must be processed.
12 Processing plants have been built in locations that will best serve
13 the largest number of SRSC growers. Allowing a grower in eastern
14 Washington to sell his shares -- *i.e.*, his right to produce sugarbeets
15 -- to a grower in eastern Idaho could result in the underutilization
16 of one processing plant and the overutilization of another. In the
17 defendants' opinion, this could have a disastrous impact upon the
18 Cooperative.

19 Viewing the record in the light most favorable to the plaintiffs,
20 a rational jury could find that the Board never had any intention of
21 allowing the plaintiffs to sell their shares to growers outside the
22 State of Washington. That does not mean a jury issue exists. The
23 only expectations that the Board was obligated to respect were
24 justifiable ones. The plaintiffs could not have justifiably expected
25 the Board to approve a sale of shares that would damage the SRSC.
26 Thus, unless a rational jury could find that the plaintiffs' attempt

1 to sell their shares to eastern-Idaho growers would not have harmed
2 the SRSC, the plaintiffs cannot prove that the Board abused its
3 discretion by blocking such sales. As the record now stands, a
4 rational jury could not find for the plaintiffs on this point.

5 F. Collective Impact

6 While neither Mr. Burton's alleged comments at the January 5th
7 meeting, nor Mr. Jaro's allegedly false assurances, nor the executive
8 committee's failure to inform the plaintiffs of its decision are
9 individually sufficient to create a jury issue, they are collectively
10 sufficient to create a jury issue with respect to whether the SRSC
11 acted in bad faith by invoking the penalty provisions in the Grower
12 Agreements based upon the plaintiffs' respective failures to plant
13 during 2005.⁵

14 **CONVERSION (Fourth Cause of Action)**

15 The plaintiffs' fourth cause of action is a claim for conversion.
16 The law of the States of Washington and Idaho concerning the tort of
17 conversion is in accord. *Compare Western Farm Service, Inc. v. Olsen*,
18 151 Wn.2d 645, 648 n.1, 90 P.3d 1053 (2004) ("conversion is a willful
19 interference with a chattel without lawful justification, whereby a
20 person entitled thereto is deprived of the possession of it")
21 (internal punctuation and citations omitted), *with Peasley Transfer &*
22 *Storage Co. v. Smith*, 132 Idaho 732, 743-44, 979 P.2d 605, 616-17
23 (1999) ("conversion is defined as a distinct act of dominion
24 wrongfully asserted over another's personal property in denial of or
25 inconsistent with rights therein") (citation omitted). Under either

26 ⁵This ruling is limited to the 2005 crop year.

1 state's law, the plaintiffs must prove that the SRSC lacked authority
2 to forfeit their shares of stock. The plaintiffs argue that the SRSC
3 lacked authority because the contractual provision upon which the SRSC
4 relied is an unenforceable liquidated damages clause.

5 The Washington Supreme Court has adopted a two-part test "to
6 determine whether a liquidated damages clause is enforceable. First,
7 the amount fixed must be a reasonable forecast of just compensation
8 for the harm that is caused by the breach. Second, the harm must be
9 such that it is incapable or very difficult of ascertainment." *Walter*
10 *Implement, Inc. v. Focht*, 107 Wn.2d 553, 559, 730 P.2d 1340 (1987)
11 (citations omitted). The preceding test is applied as of the time the
12 parties formed the contract. *Watson v. Ingram*, 124 Wn.2d 845, 851,
13 881 P.2d 247 (1994). In other words, it is a "prospective" test. *Id.*
14 at 850. The liquidated-damages test adopted by the Idaho Supreme
15 Court differs in at least one important respect. In Idaho, "parties
16 to a contract may agree upon liquidated damages in anticipation of a
17 breach, in any case where the circumstances are such that accurate
18 determination of the damages would be difficult or impossible, and
19 provided that the liquidated damages fixed by the contract bear a
20 reasonable relation to actual damages." *Graves v. Cupic*, 75 Idaho
21 451, 456, 272 P.2d 1020, 1023 (1954). By considering the non-
22 breaching party's actual damages, the Idaho test is at least partially
23 retrospective in nature. See *Watson*, 124 Wn.2d at 850 ("The question
24 before this court is whether this test is to be applied as of the time
25 of contract formation (prospectively) or as of the time of trial
26 (retrospectively)."). The parties have not addressed the apparent

1 conflict between Washington and Idaho law. They simply assume that
2 the choice-of-law clause in the Grower Agreements governs; and they
3 may be correct. See *Erwin*, 161 Wn.2d at 694-700. In any event, since
4 neither side contests the application of Idaho law, the Court will
5 employ the *Graves* test.

6 The plaintiffs bear the burden of proving that the forfeiture
7 provision in paragraph 8 is unenforceable. *Magic Valley Truck*
8 *Brokers, Inc. v. Meyer*, 133 Idaho 110, 117, 982 P.2d 945, 951
9 (Ct.App.1999). They do not appear to dispute that, when they executed
10 their respective Grower Agreements, an accurate determination of
11 damages would have been difficult. Instead, the plaintiffs focus on
12 the second prong of the *Graves* test; arguing that the forfeiture of
13 their shares of Patron Preferred Stock does not bear a reasonable
14 relationship to the damages that the SRSC actually sustained as a
15 result of their failure to grow sugarbeets during 2005 and 2006.

16 The plaintiffs submit that the price which they paid for their
17 shares of Patron Preferred Stock -- \$400.00 per share -- represents
18 the shares' minimum value. In the plaintiffs' opinion, the value of
19 their shares vastly exceeds the SRSC's actual damages. As they point
20 out, the Board demanded \$75.00 for each acre of sugarbeets that they
21 did not plant. Thus, according to the plaintiffs, the SRSC's actual
22 damages are \$75.00 per share. If the values proposed by the
23 plaintiffs are accurate, then the liquidated damages that they have
24 had to pay -- giving up stock worth \$400.00 per share -- substantially
25 exceeds the damages that the SRSC has sustained -- \$75.00 per share.
26 In other words, the SRSC has reaped an enormous windfall by forfeiting

1 the plaintiffs shares of Patron Preferred Stock.

2 The SRSC challenges both of the assumptions upon which the
3 plaintiffs' argument is based. To begin with, the SRSC submits that
4 the price which the plaintiffs paid for their shares of Patron
5 Preferred Stock was an arbitrary number. In the SRSC's opinion, the
6 \$400-per-share figure does not represent the actual value of the
7 shares at the time of purchase. Rather, according to the SRSC, the
8 figure is simply the price the plaintiffs had to pay for the privilege
9 of joining the SRSC and obtaining the benefits that membership
10 conferred. Furthermore, the SRSC argues that its actual damages are
11 substantially more than the \$75.00 per acre it demanded as a make-
12 whole payment. That figure, says the SRSC, is hundreds of dollars
13 less per share than the damages the Cooperative actually sustained as
14 a result of the plaintiffs failure to grow sugarbeets during 2005 and
15 2006. The SRSC argues that more realistic damage figures are \$465 per
16 share for 2005 and \$554 per share for 2006.

17 It is true, as the SRSC argues, that the valuation evidence
18 presented by the plaintiffs is far from overwhelming. Nevertheless,
19 the fact that the SRSC sold Patron Preferred Stock for \$400 per share
20 is some evidence of the shares' value. Similarly, the fact that the
21 SRSC demanded \$75.00 per acre as a make-whole payment is some evidence
22 of the Cooperative's actual damages. The SRSC vigorously disputes the
23 validity of the plaintiffs' valuation evidence, and the SRSC has
24 submitted valuation evidence of its own. If the SRSC is correct, not
25 only is the clause enforceable, but the plaintiffs have benefitted
26 financially from forfeiture, as opposed to paying damages. If the

1 plaintiffs are correct, the liquidated damages clause is
2 unenforceable. The dispute between the parties is material to the
3 validity of paragraph 8. The SRSC is not entitled to summary judgment
4 on this issue.

5 **ACCOUNTING AND PAYMENT OF PATRONAGE DIVIDENDS (Seventh Cause of**
6 **Action)**

7 The plaintiffs have abandoned this claim. It will be dismissed
8 with prejudice.

9 **AGRICULTURAL FAIR PRACTICES ACT (Eighth Cause of Action)**

10 The defendants concede that the plaintiffs are "engaged in the
11 production of agricultural products" within the meaning of the
12 Agricultural Fair Practices Act ("AFPA"). Hence, the plaintiffs
13 qualify as AFPA "producers." 7 U.S.C. § 2302(b). The defendants
14 further concede that they acquire and process agricultural products
15 from the plaintiffs. Hence, the defendants qualify as AFPA
16 "handlers." 7 U.S.C. § 2302(a)(1),(2). The AFPA makes it unlawful
17 for handlers to knowingly "coerce any producer in the exercise of his
18 right to . . . belong to . . . an association of producers," 7 U.S.C.
19 § 2303(a), or to knowingly "coerce or intimidate any producer to . . .
20 cancel, or terminate a membership in or contract with an association
21 of producers[.]" 7 U.S.C. § 2303(c). The plaintiffs allege that Mr.
22 Burton coerced them into relinquishing their respective memberships in
23 the cooperative by threatening to make it unprofitable for them to
24 grow sugarbeets.

25 The AFPA does not define the term "coerce." As a result, the
26 Court must give the word its ordinary and natural meaning. See *United*

1 *States v. TRW Rifle 7.62X51mm Caliber, One Model 14 Serial 593006*, 447
2 F.3d 686, 689 (9th Cir.2006). The Court may determine a word's
3 ordinary and natural meaning by consulting a dictionary. *Id.*
4 Typically, the word "coerce" is defined to mean "compel by force or
5 threat." Black's Law Dictionary (8th ed.2004). The Court may assume
6 that Congress had this definition, or something similar, in mind when
7 it enacted the AFPA. The issue, then, is whether Mr. Burton's alleged
8 statements were so threatening that objective listeners in the
9 plaintiffs' position reasonably would have felt compelled to cease
10 growing sugarbeets.

11 The plaintiffs rely exclusively upon Mr. Burton's alleged
12 statements on January 5, 2005. On that date, he allegedly told the
13 partners of Sunheaven Farms that the SRSC intended to "collapse" the
14 Washington district within three years. This might be accomplished,
15 suggested Mr. Burton, by requiring them to pay for services that were
16 then provided by the cooperative at no cost. The plaintiffs contend
17 that they were "shocked" and "devastated" by Mr. Burton's statements;
18 a contention that a rational jury easily could accept. Moreover, a
19 rational jury could find that the Sunheaven Farms partners felt
20 pressured by Mr. Burton's alleged statements. But pressure is not the
21 same as coercion. A rational jury would be unable to find that Mr.
22 Burton's alleged statements constituted coercion within the meaning of
23 the AFPA. To begin with, two of the Sunheaven Farms partners decided
24 to continue growing sugarbeets despite the pressure applied by Mr.
25 Burton. Perhaps this was because the change in policy he described --
26 *i.e.*, requiring them to pay for services that were then provided by

1 the cooperative -- was neither imminent nor certain. At the earliest,
2 the policy change was three years away. Not only that, it would
3 require approval by the board of directors. The plaintiffs were
4 represented on the board by Mr. Walker. They knew or should have
5 known that they would be entitled to object to any proposed change in
6 policy, and to suggest alternatives that would enable them to continue
7 growing sugarbeets. In view of the preceding circumstances, an
8 objective person in the plaintiffs' position would have been unable to
9 conclude during the Winter of 2005 but that he had no choice but to
10 cease growing sugarbeets.

11 **PRICE FIXING, RESALE PRICE MAINTENANCE, AND BOYCOTT (Ninth Cause**
12 **of Action)**

13 The plaintiffs have abandoned this claim. It will be dismissed
14 with prejudice.

15 **DEFENDANTS' COUNTERCLAIMS**

16 The defendants have filed counterclaims against both Bybee Farms
17 LLC and Duane Munn & Sons Farms LLC. The defendants seek declaratory
18 judgments upholding the forfeiture of their shares of Patron Preferred
19 Stock. The plaintiffs move for summary judgment.

20 A. Authority to Impose Reductions

21 The Articles arguably guarantee each member of the SRSC the right
22 to "deliver the sugarbeets from one (1) acre of land per share of
23 Patron Preferred Stock[.]" (Article IV, § 3, ¶ 2(b), p. 3.⁶) During
24

25 ⁶Paragraph 2(b) states, "The holders of Patron Preferred
26 Stock shall be entitled . . . to deliver the sugarbeets from one
(1) acre of land per share of Patron Preferred Stock held in

both 2004 and 2005, the Board unilaterally limited the number of acres of sugarbeets that the SRSC's members could plant. The plaintiffs argue that the acreage reductions imposed by the Board were ultra vires. Under the laws of the States of Washington, Oregon, and Idaho, a shareholder may seek to enjoin an ultra vires corporate action. RCW 23B.03.040; ORS 60.084; I.C. § 30-1-304.⁷ However, the plaintiffs are not seeking to enjoin the Board's allegedly ultra vires acreage-reduction decisions of 2004 and 2005. They are seeking to prevent the SRSC from invoking paragraph 8 of the Grower Agreement. Even assuming the Board's acreage reductions were ultra vires, the SRSC clearly is authorized to enforce Grower Agreements. (Article III, § 2, p. 1.) Thus, the act that the plaintiffs seek to prevent is not ultra vires. The plaintiffs are not entitled to summary judgment on this issue.⁸

accordance with the rules and regulations established by the Board of Directors **governing delivery rights and quota as exists from time to time.**" (Emphasis added.) The last clause of paragraph 2(b) seems to suggest that the one-acre-of-land-per-share provision is not inflexible; that the Board is authorized to adopt rules modifying "delivery rights and quota[.]"

⁷All three states have adopted the same section of the Revised Model Business Corporation Act.

⁸"The term 'ultra vires' . . . is used to describe corporate transactions which are outside the objects for which the corporation was created[.]" *Twisp Mining & Smelting Co. v. Chelan Mining Co.*, 16 Wn.2d 264, 293-94, 133 P.2d 300 (1943). Given the purposes for which the SRSC was incorporated, and the powers with which it is endowed, an argument can be made that the SRSC has authority to regulate the number of acres of sugarbeets that its members may plant. Section 3 of Article IV may limit the SRSC's authority, but the existence of a limit on the SRSC's

1 B. Antecedent Breaches

2 The plaintiffs allege that the SRSC breached the relevant Grower
 3 Agreements by unilaterally reducing production of sugarbeets during
 4 2004 and 2005. According to the plaintiffs, the Board's decisions
 5 infringed their contractual right to grow "one (1) acre of sugarbeets
 6 per share [of Patron Preferred Stock]." (Grower Agreement at 1.) In
 7 Washington (as in other states), "[a] material breach suspends the
 8 injured party's duties until the breaching party cures the default."
 9 *Bailie Comm., Ltd. v. Trend Business Systems*, 53 Wn. App. 77, 81, 765
 10 P.2d 339 (1988) (citing *Restatement (Second) of Contracts* §§ 237, 241
 11 (1981)). Consequently, if the Board's acreage reductions materially
 12 breached the relevant Grower Agreements, the plaintiffs may have been
 13 relieved of their duty to plant sugarbeets.⁹

14 Whether a breach is material is a question of fact. *TMT Bear*
 15 *Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App.
 16 191, 209, 165 P.3d 1271 (2007). Section 241 of the *Restatement* lists

17 authority does not necessarily mean that the Board's acreage
 18 reductions were ultra vires. Cf. *Hartstene Pointe Maintenance*
 19 *Ass'n v. Diehl*, 95 Wn. App. 339, 345, 979 P.2d 854 (1999)
 20 (distinguishing between a challenge to the existence of corporate
 21 authority and a challenge to the manner in which a corporation
 22 exercises its authority).

23 ⁹The Grower Agreement contains a choice of law clause. The
 24 Court need not decide whether the clause is effective unless
 25 there is an actual conflict between Washington and Idaho law.
 26 *Erwin*, 161 Wn.2d at 692. Although the Idaho Supreme Court may
 not have adopted sections 237 and 241, it is well established
 that "one cannot declare a forfeiture of a contract where he
 himself is materially in default." *Barnard & Sons, Inc. v.*
Akins, 109 Idaho 466, 708 P.2d 871 (1985).

1 five circumstances that are relevant to a determination of
2 materiality:

3 (a) the extent to which the injured party will be
4 deprived of the benefit which he reasonably expected;

5 (b) the extent to which the injured party can be
6 adequately compensated for the part of that benefit of which
7 he will be deprived;

8 (c) the extent to which the party failing to perform or
9 to offer to perform will suffer forfeiture;

10 (d) the likelihood that the party failing to perform or
11 to offer to perform will cure his failure, taking account of
12 all the circumstances including any reasonable assurances;

13 (e) the extent to which the behavior of the party
14 failing to perform or to offer to perform comports with
15 standards of good faith and fair dealing.

16 *Restatement, supra*, § 241.¹⁰

17 The parties disagree with respect to whether the 2004 and 2005
18 acreage reductions deprived the plaintiffs of benefits. The
19 plaintiffs point out that they were not allowed to plant one acre of
20 sugarbeets for each share of Patron Preferred Stock they held. In
21 response, the defendants submit that the acreage reduction was
22 necessary to keep the SRSC operating profitably.

23 Assuming, for purposes of argument, that the acreage reductions
24 deprived the plaintiffs of benefits, their loss was small when
25 compared to the payments which they received from the SRSC for the
26 sugarbeets they delivered. Furthermore, the plaintiffs may bring an
27 action for damages to recover any benefits they lost as a result of

28 ¹⁰The Washington Court of Appeals has approved use of the
29 above-quoted factors. *TMT Bear Creek Shopping Ctr., Inc.*, 140
30 Wn. App. at 209 and n.8.

1 the SRSC's alleged breach. A damage award should fully compensate
2 them.

3 "A material failure by one party gives the other party the right
4 to withhold further performance as a means of securing his expectation
5 of an exchange of performances." *Restatement, supra*, § 241, cmt. e.
6 The plaintiffs planted sugarbeets during 2004 despite the Board's
7 decision to impose a 5% acreage reduction. The SRSC paid the
8 plaintiffs for the sugarbeets they delivered. There is no evidence
9 that, as the 2005 planting season approached, the plaintiffs thought
10 that the SRSC was breaching the Grower Agreements by limiting
11 production. Nor is there any evidence that the plaintiffs refrained
12 from planting sugarbeets during 2005 in order to secure their
13 expectations under the Grower Agreements. To the contrary, it is
14 undisputed that their decision to refrain from planting was based upon
15 entirely unrelated considerations. Furthermore, if the plaintiffs had
16 planted sugarbeets during 2005, there is every reason to think the
17 SRSC would have paid them for the sugarbeets they delivered. In other
18 words, the plaintiffs' expectations under their respective Grower
19 Agreements were reasonably secure during 2005 despite the acreage
20 reductions. The plaintiffs' failure to plant during 2005 did not
21 increase their security. If anything, it undermined their security.
22 See *id.* ("To the extent that [the injured party's] expectation is
23 already reasonably secure, in spite of the failure [of the breaching
24 party to perform], there is less reason to conclude that the
25 [breaching party's] failure is material.").

26 The final circumstance is the presence or absence of good faith

1 or fair dealing. Although a party to a contract may, in good faith,
2 fail to perform a duty and breach the agreement, "[t]he extent to
3 which the behavior of the party failing to perform . . . comports with
4 standards of good faith and fair dealing is . . . a significant
5 circumstance in determining whether the failure is material."

6 *Restatement, supra*, § 241, cmt f. The Board claims it imposed acreage
7 reductions in an effort to maintain the financial health of the
8 Cooperative. Moreover, the Board did not single out the plaintiffs;
9 the reductions applied to all SRSC sugarbeet growers.

10 No one of the preceding factors is dispositive in determining
11 whether the SRSC's alleged breaches of the Grower Agreements were
12 material. Upon weighing all of the factors, a rational jury could
13 find that the SRSC's alleged breaches were not material. By way of
14 example only, the jury might be persuaded by evidence that, during
15 2004 and 2005, the plaintiffs did not perceive the acreage reductions
16 as breaches; did not think that the reductions threatened their
17 expectations under the Grower Agreements; and did not refrain from
18 planting in order to secure performance by the SRSC. It follows that
19 the plaintiffs are not entitled to summary judgment on this issue.

20 C. Liquidated Damages

21 As explained above, the plaintiffs allege that paragraph 8 of the
22 Grower Agreements is an unenforceable liquidated damages clause. See
23 *supra* pp. 29-33. Just as the SRSC is not entitled to summary judgment
24 on this issue, neither are the plaintiffs.

25 **SUMMARY**

26 The plaintiffs may proceed to trial upon their causes of action

1 for promissory estoppel (first), breach of the covenant of good faith
2 and fair dealing (third), and conversion (fourth). At a minimum, the
3 plaintiffs' remaining claims raise the following issues: (1) whether
4 Mr. Burton promised the plaintiffs that the SRSC would purchase their
5 shares of patron preferred stock at a reasonable price if they ceased
6 growing sugarbeets during 2005, (2) whether Mr. Burton's alleged
7 promise is actionable under the doctrine of promissory estoppel, (3)
8 whether Mr. Burton had apparent authority to make the promise alleged
9 by the plaintiffs, (4) whether Mr. Jaro made the statements attributed
10 to him by Brandon Munn, (5) whether Mr. Jaro's alleged statements
11 constituted a promise on the part of the SRSC to refrain from
12 demanding make-whole payments with respect to the 2005 crop until a
13 purchase-sale agreement was executed, (6) whether the SRSC acted in
14 bad faith by invoking the penalty provisions in the Grower Agreements
15 based upon the plaintiffs' failure to plant sugarbeets during 2005,
16 and (7) whether the SRSC had authority to forfeit the plaintiffs'
17 respective shares of patron preferred stock. The preceding issues and
18 claims are not the only ones that remain to be resolved. The SRSC
19 seeks declaratory judgments upholding its forfeiture of the
20 plaintiffs' respective shares of stock. At a minimum, the SRSC's
21 counterclaims raise issues with respect to whether paragraph 8 of the
22 Grower Agreements is an enforceable liquidated damages clause.

23 **IT IS HEREBY ORDERED:**

24 1. The defendants' motion for partial summary judgment with
25 respect to the plaintiffs' first and second causes of action (**Ct. Rec.**
26 **166**) is **denied** in part and **granted** in part:

1 (a) The defendants' motion to dismiss the plaintiffs' promissory
2 estoppel claim (first cause of action) is **denied**.

3 (b) The defendants' motion to dismiss the plaintiffs' unjust
4 enrichment claim (second cause of action) is **granted**.

5 2. The defendants' motion for partial summary judgment with
6 respect to the plaintiffs' third, fourth, seventh, and eight causes of
7 action (**Ct. Rec. 167**) is **denied** in part, **reserved** in part, and **granted**
8 in part:

9 (a) The defendants' motion to dismiss the plaintiffs' claim for
10 breach of the covenant of good faith and fair dealing (third cause of
11 action) is **denied**.

12 (b) The Court **reserves ruling** with respect to the defendants'
13 motion to dismiss the plaintiffs' claim for conversion (fourth cause
14 of action). The defendants may renew this motion at the conclusion of
15 the plaintiffs' case in chief.

16 (c) The defendants' motion to dismiss the plaintiffs' claim for
17 Accounting and Payment of Patronage Dividends (Seventh Cause of
18 Action) is **granted**.

19 (d) The defendants' motion to dismiss the plaintiffs' claim for
20 violation of the Agricultural Fair Practices Act (Eighth Cause of
21 Action) is **granted**.

22 3. The defendants' motion for partial summary judgment with
23 respect to the plaintiffs' ninth cause of action (Price Fixing, Resale
24 Price Maintenance, and Boycott) (**Ct. Rec. 168**) is **granted**.

25 4. The plaintiffs' motion to dismiss the defendants'
26 counterclaims (**Ct. Rec. 188**) is **denied**.

1 5. The plaintiffs' motion to strike (Ct. Rec. 230) is **denied** as
2 moot.

3 6. The defendants' motion to strike (Ct. Rec. 238) is **denied** as
4 moot.

5 7. The plaintiffs' motion to strike (Ct. Rec. 272) is **denied** as
6 moot.

7 8. The defendants' motion in limine (Ct. Rec. 279) is **denied** with
8 leave to refile as needed.

9 9. The plaintiffs' motion in limine (Ct. Rec. 282) is **denied** with
10 leave to refile as needed.

11 10. The plaintiffs' motion in limine (Ct. Rec. 284) is **denied**
12 with leave to refile as needed.

13 11. Within the next seven days, the Court will notify counsel of
14 the date and time for a scheduling conference.

15 **IT IS SO ORDERED.** The District Court Executive is hereby
16 directed to enter this order and furnish copies to counsel.

17 **DATED** this 29th day of September, 2008.

18
19 s/Fred Van Sickle
20 Fred Van Sickle
21 Senior United States District Judge
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